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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 193

AETNA INSURANCE COMPANY,
Petitioner,

v.

C. A. VERNON AND MARIANNE VERNON,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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5 Appleman, Insurance Law and Practice, Sec. 3502, p. 279, n. 71 7

7 Couch, Cyclopedia of Insurance Law, Sec. 1557, p. 5516, n. 13 7

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In The

Supreme Court of the United States

October Term, 1962

No. 193

Aetna Insurance Company,

Petitioner,

v.

C. A. Vernon and Marianne Vernon,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is now reported in 301 F. 2d 86.

QUESTIONS PRESENTED

Respondents submit the following as more accurately stating the questions presented by petitioner's application for writ of certiorari.

1. Does the decision of the Court of Appeals applying the statutory and common law of Texas to this case in any way conflict with the spirit and letter of the McCarran Act of 1945 (15 U.S.C. 1011-12)?

ARGUMENT

COUNTERPOINT ONE

(In Response to Petitioner's Point 1(a) and 2)

THE COURT OF APPEALS' APPLICATION OF TEXAS LAW TO THIS CASE FULFILLS THE REQUIREMENT OF THE McCARRAN ACT OF 1945 (15 U.S.C. 1011-12) THAT THE SEVERAL STATES REGULATE THE BUSINESS OF INSURANCE WHERE POSSIBLE.

Argument and Authorities

Petitioner contends that the Court of Appeals for the Fifth Circuit should not have made a determination of the applicability of Article 21.19, Texas Insurance Code, to the case at hand; and that by doing so the Court has violated the terms of the McCarran Act of 1945 (15 U.S.C. 1011-12).

Just how the court's application of Texas law to an insurance question could violate an act which declares continued regulation of the insurance business by the States to be in the public interest, petitioner does not attempt to explain. There is no explanation because, of course, there is no violation! By applying Texas law to this problem, the court has fulfilled the declared policy of the Act.

Wilburn Boat Company v. Firemen's Fund Insurance Company, 348 U.S. 310 (1955) gives no support to Petitioner's contention as that case deals with the entirely different question of whether a contract of marine insurance should be interpreted under general maritime law or under state law.

Even without the McCarran Act of 1945, the Court of Appeals was still under a duty to apply the law of Texas to this case, to the extent that it could do so. When the jurisdiction of a Federal court is invoked upon the ground

of diversity of citizenship, of a case is removed to the Federal court on that ground, the Federal court on matters of general law is governed by, and must apply the law of the state, and follow precedents established by state decisions. *Erie v. Tompkins*, 304 U.S. 64 (1938); 28 U.S.C. 1652. And, where a question of state law is not settled by state decisions, it is the duty of a Federal court to decide the question when necessary to the rendition of its judgment. *Huddleston v. Dwyer*, 322 U.S. 232 (1944). Further, the fact that the state law problem confronting the court may be difficult to solve does not relieve a Court of Appeals of its duty to make a decision. *Spiegel's Estate v. Commissioner of Internal Revenue*, 335 U.S. 701 (1949); *Meredith v. Winter Haven*, 320 U.S. 228 (1943).

COUNTERPOINT TWO

(In Response to Petitioner's Point 1(c) and 3)

THE DECISION OF THE COURT OF APPEALS FOLLOWS THE MANDATE OF THE TEXAS LEGISLATURE AND THE SUPREME COURT OF TEXAS REQUIRING THAT PROVISIONS OF THE REVISED TEXAS STATUTES BE LIBERALLY CONSTRUED AND THAT POLICIES OF INSURANCE BE INTERPRETED AND CONSTRUED LIBERALLY IN FAVOR OF THE INSURED AND STRICTLY AGAINST THE INSURER.

Argument and Authorities

In Article 10, Sec. 8 of the Revised Texas Statutes the Texas Legislature has expressly required that:

> "The rule of the common law that statutes in derogation thereof shall be strictly construed shall have no application to the Revised Statutes [and the said statutes] shall constitute the law of this State respecting

the subjects to which they relate; and the provisions thereof shall be liberally construed with a view to effect their objects and to promote justice."

See *Clark v. W. L. Pearson & Co.*, 121 Tex. 34, 39 S.W. 2d 27, syl. 9 (1931). And a cardinal rule in Texas for statutory interpretation and construction is to seek out the legislative intent from a general view of the enactment as a whole and, once the intent has been ascertained, to construe the statute so as to give effect to the purpose of the legislature. *Board of Insurance Com'rs. v. Great Southern Life Ins. Co.*, 150 Tex. 258, 239 S.W. 2d 803 syl. 1 (1951). Further, it is a settled rule in Texas that policies of insurance will be interpreted and construed liberally in favor of the insured and strictly against the insurer. *Continental Gas Co. v. Warren*, 254 S.W. 2d 762, syl. 1 (1953); *Providence Washington Ins. Co. v. Proffitt*, 150 Tex. 207, 239 S.W. 2d 379, syls. 4 & 5 (1951). See 32 Tex. Jur. 2d, Insurance Sec. 60, p. 121.

Following this clear Texas pattern for the construction and interpretation of statutes and insurance policies, the majority of the Court of Appeals quite properly ruled that Article 21.19, Texas Insurance Code, is applicable to false statements made subsequent to the institution of suit upon the policy, brought after denial of liability by the insurer. To have decided otherwise would have been to place a far too restricted and technical interpretation on the phrase "proofs of loss" and would have done violence to the obvious intent of Article 21.19 and the Texas Insurance Code generally. (See *Fireman's Fund Ins. Co. v. Reynolds*, 85 S.W. 2d 826, syls. 3-5 (Tex. Civ. App. 1935, error ref'd).

The two Texas Supreme Court cases cited by petitioner at page 10 of its brief deal with rules of statutory construction not applicable here, and they are not in conflict

with the decision of the Court of Appeals or the Texas cases which respondents have cited above.

As for construction, interpretation and application of the clause in question, the Court of Appeals had to turn to the decisions of other states inasmuch as there are no Texas decisions on point. This course was incumbent on the court if it were to carry out its duty to decide the substantive question before it. The court found persuasive those authorities which hold that once an insurance company has denied its liability under the policy and plaintiffs have filed suit, the rights of the parties are fixed as of that time and the insurance company cannot take advantage of any breach of policy conditions occurring after suit is begun. *American Paint Service v. Home Insurance Co. of N.Y.*, 246 F. 2d 91 (3rd Cir. 1957); *Third National Bank v. Yorkshire Insurance Co.*, 218 Mo. App. 660, 267 S.W. 445 (1924); *Deitz v. Providence Washington Ins. Co.*, 33 W. Va. 526, 11 S.E. 50 (1890); See 5 Appleman, *Insurance Law and Practice*, Sec. 3362 p. 379, n. 71; 7 *Couch, Cyclopedia of Insurance Law*, Sec. 1557, p. 5516 n. 13; Annotation 64 ALR 2d 962 Sec. 2.

Certainly the majority of Court of Appeals for the Fifth Circuit was justified in concluding that this interpretation of the fraud and false swearing clause was the preferable one to be applied in Texas in light of the Texas requirement that terms of an insurance policy are to be construed liberally in favor of the insured and strictly against the insurer.

Under the circumstances of this case, respondent submit that the Supreme Court's general policy of leaving undisturbed a Court of Appeals holding on a question of state law should be followed. *Hoffman v. Stuart*, 317 U.S. 154 (1942).

COUNTERPOINT THREE

(In Response to Petitioner's Points 1(b), 1(c), 1(d), 2(a) and 4)

THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT DIRECTLY OR IN PRINCIPLE WITH DECISIONS OF THIS COURT, OTHER COURTS OF APPEALS, OR ITS OWN DECISIONS.

A. Decision of This Court and Other Courts of Appeals

Argument and Authorities

The majority of the Court of Appeals for the Fifth Circuit has determined that Article 21.19, Texas Insurance Code, is applicable to the affidavit in question and prevents forfeiture; and that the fraud and false swearing clause in question is not applicable because respondent, Marianne Vernon's conflicting affidavits were made after respondents' claim was rejected by petitioner. These determinations of Texas law do not conflict with any of the Federal decisions cited by petitioner.

Claflin v. Franklin Insurance Company, 110 U.S. 81 (1884); *Globe & Rutgers Fire Insurance Company v. Stallard*, 68 F. 2d 237 (4th Cir. 1934); and *Columbian Insurance Company of Indiana v. Modern Laundry*, 277 F. 355 (8th Cir. 1921) all being decisions reached prior to *Erie v. Tompkins*, 304 U.S. 64 (1938) naturally assumed the right (established by *Swift v. Tyson*, 16 Pet. (U.S.) 1 (1842)) to determine for themselves as to the unwritten or common law. Now, of course, by reason of *Erie*, Federal courts must apply the common law of the state in which they are located. Thus, there is no longer a body of Federal common law with which the decision of the Court of Appeals below could come in conflict.

B. Other Decisions of The Court of Appeals for The Fifth Circuit

Argument and Authorities

As pointed out by the Court of Appeals below *Chauchoa v. American Central Insurance Company*, 241 F. 2d 889 (5th Cir. 1957) is not contrary to this decision. First, because this was an appeal from a summary judgment the Court of Appeals accepted as undisputed, respondents' contention that respondent Marianne Vernon's first affidavit was not made to "cheat deceive and cause the insurer to do other than it would have done had the truth been told" (as required by *Chauchoa*), but because she was improperly induced to make the affidavit by a person acting for petitioner. Secondly, *Chauchoa* was decided under the law of Florida, and the court at page 892, n. 5 specifically predicated its decisions upon ". . . the absence of statute, e.g., Article 21.19, Texas Insurance Code, V.A.T.S.; *Firemen's Fund Ins. Co. v. Reynolds*, 85 S.W. 2d 826 (Tex. Civ. App. 1935, error ref'd); . . ."

As for *Firemen's Fund Insurance Co. v. Hibbard Boat Co.*, 300 F. 2d 631 (5th Cir. 1962), there is no conflict because in that case the misrepresentations in question were made at the time the insurance policy was obtained and after coverage was unreasonably sought to justify the in suits. The statute there in question was Article 21.16 Texas Insurance Code, not Article 21.19. Also, the *Hibbard* case did not involve a misrepresentation that occurred after suit had been fi

COUNTERPOINT FOUR

(In Response to Petitioner's Points 2(b) and 3)

PETITIONER HAS NOT PRESENTED ANY EVIDENCE SUFFICIENT TO IMPAIR THE TECHNICAL VALIDITY

OF RESPONDENT MARIANNE VERNON'S SECOND AFFIDAVIT; NOR HAVE ATTORNEYS FOR RESPONDENTS ACTED IN BAD FAITH IN CONTINUING TO URGE THE VALIDITY OF THE SECOND AFFIDAVIT.

Argument and Authorities

As respondents stated to the Court of Appeals, it is indeed strange than an advocate would resort to such a strained interpretation of the facts in order to charge his adversaries with bad faith! Nowhere in the transcript submitted by Aetna does Marianne Vernon say that her second affidavit was not given under oath, as alleged by Aetna. And Petitioner attributes statements to the notary public which he simply did not make. He did not testify that he had both religious and individual scriples against administering an oath. (Petitioner's brief 5). What he did say is completely set out in respondents' statement of the case (*supra* 3) and is also summarized in the opinion of the Court of Appeals at footnote 5. Under this state of facts, the Court below properly found that under Texas law petitioner had made no showing sufficient to impair the technical validity of the second affidavit. *Vaughan* v. *State*, 177 S.W. 2d 59 (Tex. Crim. App. 1943).

Petitioner predicates its charge of bad faith on the fact that one of respondents' attorneys of record chose to inquire into the procedural validity of Marianne Vernon's second affidavit, and then subsequently respondents' attorneys of record continued to assert the affidavit's validity before the Court of Appeals. The response to their contention is obvious. Respondents' attorneys did not prove at the preliminary hearing that the affidavit was not given under oath. To the contrary, it appeared to them then and it appears to them now that the affidavit's procedural integrity was not impaired by the notary public's testimony. This

legal conclusion on the part of respondents' attorneys has been confirmed by the Court of Appeals. Petitioner's contention of bad faith is, respondents submit, without any semblance of merit!

CONCLUSION

Respondents reiterate that it is significant to note which side in this controversy seeks full exposure of the truth. Surely respondents do not fear it — they ask only that their contentions be put to the test of a trial on the merits. No, it is Aetna who wishes to postpone that day of reckoning forever!

A Majority of the Court of Appeals for the Fifth Circuit has correctly determined and applied Texas law to this case, and that decision does not conflict with the McCarran Act of 1945, with decisions of this Court, with decisions of other Courts of Appeals, with its own decisions, or with decisions of the Supreme Court of Texas.

Therefore, respondents respectfully submit that this petition should be denied.

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Service of the above brief is hereby acknowledged by Petitioner's Attorney of record this ..... day of ....., 1962.

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